Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) v WT Low & Ng Realty Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S3-24-1038 OF 1994
ZAINUN ALI JC
29 AUGUST 1996

Land Law *— Charge — Notice of default — Interest stated in notice higher than prescribed in charge document — Whether notice valid — Whether plaintiff entitled to impose a higher rate due to borrower's failure to maintain proper account — National Land Code 1965 s 256 & Form 16D — Rules of the High Court 1980 O 83*

Land Law *— Charge — Demand for penalty interest — Higher rate of interest imposed due to borrower's failure to maintain proper account — Whether there must be express provision or otherwise for imposition of penalty interest — Whether onus on chargee to justify imposition of penalty interest — National Land Code 1965 s 256 — Rules of the High Court 1980 O 83*

The plaintiff granted various banking facilities to a borrower secured by a third party charge over a piece of land of which the defendant was a chargor. Upon default by the borrower, the plaintiff commenced foreclosure proceedings. The defendant contended that interest stated in Form 16D of the National Land Code 1965 ('the NLC') was higher than the prescribed rate in the charge document and therefore the notice was ineffective and invalid.The plaintiff, however, contended that they were entitled to impose a higher rate due to the borrower's failure to repay and maintain a proper account.

Held, dismissing the plaintiff's claim:

In order to enable the plaintiff to impose a penalty interest, there must be an express provision or otherwise in either the charge instrument, letter of variation of the term or any subsequent notice in connection therewith. As there was no such provision, the plaintiff was precluded from imposing such a penalty interest. As such, the plaintiff in this case was making a wrongful demand for payment for something to which it was not entitled in law. Thus, in the absence of an express provision and a valid notice thereof, the demand was of a penalty of which the onus was on the plaintiff to prove loss.

The plaintiff had not offered any evidence of such losses as to justify such penalty interest. Further, the plaintiff had failed to comply with the mandatory requirements pursuant to O 83 of the Rules of the High Court 1980 and s 256 of the NLC by failing to state the exact amount owing under these provisions. This rendered the Form 16D notice and notice of demand to be ineffectual and invalid.

In the circumstances, there existed a cause to the contrary as to why an order for sale ought not to be granted (see p 189B–F); *Co-operative Central Bank Ltd (In receivership) v Meng Kuang Properties*

Bhd [1991] 2 CLJ 1144, *Credit Corp (M) Bhd v Bulan Sabit Sdn Bhd & Ors* [1989] 1 CLJ 912 and *Maimunah bte Megat Montak v Mayban Finance Bhd* [1996] 2 MLJ 422 followed.

[Bahasa Malaysia summary

Plaintif telah memberikan pelbagai kemudahan urusan bank kepada seorang peminjam yang dijamin oleh suatu gadaian pihak ketiga atas sebidang tanah yang mana defendan merupakan seorang penggadai. Apabila peminjam ingkar, plaintif telah memulakan prosiding penutupan gadai janji. Defendan menghujahkan bahawa faedah yang dinyatakan dalam Borang 16D Kanun Tanah Negara 1965 ('KTN') adalah lebih tinggi daripada kadar yang ditetapkan dalam dokumen gadaian dan oleh itu notis adalah tidak berkesan dan tak sah. Namun demikian, plaintif menghujahkan bahawa mereka berhak mengenakan kadar yang lebih tinggi disebabkan kegagalan peminjam untuk membayar balik dan mengekalkan akaun yang wajar.

Diputuskan, menolak tuntutan plaintif:

Bagi membolehkan plaintif mengenakan faedah penalti, mesti terdapat suatu peruntukan nyata atau sebaliknya sama ada dalam instrumen gadaian, surat pengubahan terma atau apa-apa notis berkaitan yang menyusul. Oleh kerana tiada peruntukan demikian, plaintif dihalang daripada mengenakan faedah penalti demikian. Maka, plaintif dalam kes ini membuat tuntutan yang salah untuk bayaran atas sesuatu yang ia tidak berhak mendapat dari segi undang-undang. Justeru itu, dalam ketiadaan peruntukan nyata dan satu notis sah tentangnya, tuntutan adalah mengenai penalti yang mana beban terletak pada plaintif untuk membuktikan kerugian.

Plaintif tidak menawarkan apa-apa bukti tentang kerugian demikian bagi memberi justifikasi kepada faedah penalti. Seterusnya, plaintif telah gagal mematuhi keperluan mandatori menurut A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 dan s 256 KTN dengan kegagalan untuk menyatakan amaun sebenar yang terhutang di bawah peruntukan-peruntukan ini. Ini menyebabkan notis Borang 16D dan notis tuntutan tidak berkesan dan tak sah.

Dalam keadaan demikian, wujud satu sebab bertentangan atas mengapa satu perintah jualan tidak patut diberikan (lihat ms 189B–F); *Co-operative Central Bank Ltd (In receivership) v Meng Kuang Properties Bhd* [1991] 2 CLJ 1144, *Credit Corp (M) Bhd v Bulan Sabit Sdn Bhd & Ors* [1989] 1 CLJ 912 dan *Maimunah bte Megat Montak v Mayban Finance Bhd* [1996] 2 MLJ 422 diikut.]

Notes

For cases on charges on land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1408–1564.

Cases referred to

Co-operative Central Bank Ltd (In receivership) v Meng Kuang Properties Bhd [1991] 2 CLJ 1144 (folld)

Credit Corp (M) Bhd v Bulan Sabit Sdn Bhd & Ors [1989] 1 CLJ 912 (folld)

Maimunah bte Megat Montak v Mayban Finance Bhd [1996] 2 MLJ 422 (folld)

Malaysia Building Society Bhd v Lim Kheng Kim & Ors [1988] 3 MLJ 175 (refd)

Legislation referred to

National Land Code 1965 s 256, Form 16D

Rules of the High Court 1980 O 83

KY Wong and *HC Yong* (*Ng Yook Noon Andrew TC Saw & Co*) for the plaintiff.

S Siva (*Cheah Teh & Su*) for the defendant.

Zainun Ali JC: In this originating summons, the plaintiff sought to foreclose a piece of property, ie CT 8602 No 2495 in the Mukim of Setapak ('the land').

The plaintiff had granted to one Lian Huat Seng Marketing Sdn Bhd ('the borrower') several banking facilities totalling RM1.3m. As security, the defendant executed a charge on the land in favour of the plaintiff, and this charge was registered on 8 March 1983.

It is a term of the said charge in para 1 thereof that the agreed rate of interest shall be 14.5% per annum with monthly rests.

It was also provided in the said charge that the defendant would, on demand by the plaintiff, repay to the plaintiff together with interest thereon all sums of money due and owing to the plaintiff by the defendant in respect of the said banking facilities.

On 15 April 1994, the plaintiff through its solicitor issued a letter of demand dated the same to the defendant, demanding settlement of:

(a) the sum of RM2,393,797.95 due and owing to the plaintiff in respect for the overdraft of RM500,000 granted to the borrower inclusive of interest calculated up to, and including, 30 November 1993 with further interest thereon at the value rate of 14.5% per annum calculated on daily outstanding balance from 1 December 1993 to the date of full payment; and

(b) the sum of RM210,761.90 due to the plaintiff in respect of the letter of credit of RM800,000 with sub-limit for trust receipts not exceeding RM200,000 granted to the borrower inclusive of interest calculated up to, and including, 30 November 1993 with further interest thereon at the rate of 14.5% calculated on the daily outstanding balance from 1 December 1993 to the date of full payment.

The defendant did not comply with the plaintiff's letter of demand and thereafter the plaintiff issued a statutory notice and Form 16D of the National Land Code 1965 ('the NLC') dated 23 May 1994 requiring the defendant to remedy the said breach within seven days from the date of service, failing which an order for sale of the land would be applied for.

The said Form 16D was duly served on the defendant on 1 June 1994.

The defendant apparently also failed to comply with said statutory notice.

Several affidavits were filed by the plaintiff regarding the latest status of the balance due. The defendant reciprocated and likewise filed several affidavits in reply.

As outlined by the documentary evidence, the defendant's contention, inter alia, was that there was no debt due and owing to the plaintiff.

Secondly, that the demand by the plaintiff in the Form 16D notice for the said sum of money was a demand which the plaintiff was not entitled to in law and therefore such demand was invalid.

The latest statement of account filed by the plaintiff showed that as at 19 August 1996, the outstanding overdraft was RM3,599,954.19 and the outstanding trust receipt was RM3,868,987.23.

According to the plaintiff:

(a) the amount advanced under the said charge was RM100,000;

(b) the amount of repayment as at 13 June 1996 is RM45,985.29;

(c) the amount of interest in arrears as at the date of issuance of the originating summons, ie 20 December 1994 is RM2,022,633.14 and as at the date of the affidavit of 13 July 1996 is RM2,768,266.48;

(d) the amount remaining under the charge on 19 August 1996 is RM3,861,987.23 and interest will accrue at the rate of 14.5% per annum on the daily outstanding balance from 9 June 1995 to date of full payment; and

(e) the amount of day's interest is RM1,470.98 (subject to changes in the balance of the overdraft and trust receipt).

The defendant contended that the particulars appearing in the affidavit of the plaintiff was misconceived, that the imposition of the interest rate is excessive thus rendering the Form 16D notice ineffective and invalid. The issue in this matter, as I see it, hinges principally on the question of interest.

This court has had sight of the documents in this matter. Whilst it is true that the parties had agreed to the rate of interest to be imposed — as manifested in the charge document, ie at 14.5% — there was, however, a subsequent variation to that agreement. This found expression in the plaintiff's letter of 11 August 1986 to the defendant, setting out in clear terms the interest rate on its overdraft, term loan and trust receipt which were placed at 3.25% above the base lending rate which at that time was 10.5%.

Generally, the bank and its customer are free to agree to whatever rate of interest they consider appropriate (as long as it is not grossly

A excessive). If it is a genuine commercial rate of interest, the court would be hesitant in interfering with the bargain the parties have struck. I would be diffident in this regard.

It is significant that the plaintiff in his affidavit of 7 July 1995 admitted that even though he ought to have imposed interest at 3.25% B above the base lending rate, the plaintiff emphasized that this rate is imposable only upon an account which is regularly maintained.

Paragraph 7 of the said affidavit went on to state that by virtue of the defendant's failure to maintain a proper account and his failure to pay, the plaintiff could impose a penalty interest. The plaintiff claimed that this right C flows from the plaintiff's letter of offer dated 9 April 1984 and the letter from the Association of Banks in Malaysia dated 19 September 1987.

I must confess that much as I tried, I was hard put to trace any evidence either express or otherwise which would put to rest my doubt as to the plaintiff's right to impose a higher interest rate than that which was agreed upon in any of the documents mentioned above.

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The penalty provision seems to be elusive. Since it escapes me, likewise it escapes the defendant. There is nothing in the charge instrument, nothing in the letter of variation of the term dated 11 August 1986, nothing in the nature of a subsequent notice in connection therewith. In short, no hint of such a right to impose a penalty interest, exists. Thus, the E plaintiff is precluded from imposing such a penalty interest.

In fact, there is — as was decided in *Co-operative Central Bank Ltd (In receivership) v Meng Kuang Properties Bhd* [1991] 2 CLJ 1144 — a distinction to be made between an erroneous sum specified in the notices of demand and a wrongful demand for payment of something to which the chargee is F not entitled. In this case, the plaintiff was demanding something to which they were not entitled in law.

In the circumstances, I find the plaintiff's imposition of a rate of interest above the declared rate — in the absence of an express provision and a valid notice thereof — to be, in effect, a penalty. The onus is thus on the plaintiff to so prove loss which does not seem to be forthcoming from G the pleadings.

The plaintiff appeared to be in a morass, and although I would not place too great an emphasis on the earlier summons which the plaintiff himself withdrew, there appeared to be a capricious imposition by the plaintiff of an interest rate which bordered on arbitrariness.

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The plaintiff admitted in his application of 7 July 1995 that the earlier summons was withdrawn since the interest rate was erroneous. Thus, the plaintiff seems to have got their figures wrong, not once but twice.

In the circumstances, and going by the strength of the court's decision in *Credit Corp (M) Bhd v Bulan Sabit Sdn Bhd & Ors* [1989] 1 CLJ 912, I the plaintiff has failed under O 83 of the Rules of the High Court 1980 ('the RHC') and s 256 of the NLC. There has clearly been a failure by the plaintiff to set up in the affidavit the exact amount owing under O 83 of the RHC and s 256 of the NLC. The provision of s 256 of the NLC is

mandatory, as per Edgar Joseph Jr FCJ in *Maimunah bte Megat Montak v Mayban Finance Bhd* [1996] 2 MLJ 422.

Thus, there is a wrongful demand by the plaintiff for the payment and interests prayed for in their originating summons. This renders the Form 16D notice and notice of demand to be ineffectual and invalid.

However, I disagree with the defendant's contention that the plaintiff cannot obtain judgment against the person who provides security. This principle still holds good as the case of *Malaysia Building Society Bhd v Lim Kheng Kim & Ors* [1988] 3 MLJ 175 amply illustrates.

Thus, in the circumstances, there exists a cause to the contrary as to why an order for sale ought not to be granted. This court dismissed the plaintiff's claim with costs.

Claim dismissed.

Reported by Tey Tsun Hang